Tiffany (NJ) Inc. et al v. eBay Inc. Doc. 69

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIFFANY (NJ) INC. and TIFFANY AND COMPANY,

Plaintiffs,

v.

eBAY INC.,

Defendant.

Case No. 04 Civ. 4607 (RJS)

MEMORANDUM OF DEFENDANT EBAY IN SUPPORT OF ITS OBJECTIONS TO PLAINTIFFS' EXHIBITS 425-428 AND THE PORTIONS OF CAROLINE NAGGIAR'S DECLARATION QUOTING THEREFROM

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Defendant eBay Inc. ("eBay") respectfully submits this memorandum of law in support of its objections to the admissibility of Exhibits 425-428 offered by Plaintiffs Tiffany (NJ) Inc. and Tiffany and Company (collectively, "Tiffany") and to the corresponding paragraphs of Caroline Naggiar's declaration that reference these exhibits. Plaintiffs' exhibits, and Ms. Naggiar's extensive quoting therefrom, constitute impermissible hearsay under Rules 801 and 802 of the Federal Rules of Evidence. Accordingly, the exhibits and testimony should be stricken in their entirety.

Tiffany concedes that the evidence it seeks to introduce constitutes hearsay, yet it nonetheless asserts that the evidence should be admitted, "the hearsay rules notwithstanding." Pls.' Bench Mem. of Law in Opp. to Deft.'s Objections to Exhibits 425-428, dated November 12, 2007 ("Tiffany Opp.") at 4 (emphasis added). Tiffany bases its argument for the admissibility of these exhibits and testimony on the purported fact that "unsolicited coverage in published materials is routinely accepted in trademark cases." Tiffany Opp. at 1. This novel theory is unavailing. Indeed, Tiffany has ignored the requirements it must satisfy under the Federal Rules of Evidence in order for its evidence to be admitted, and it has compounded that error by relying upon inapposite case law.

Tiffany states that the purpose of offering the testimony of Ms. Naggiar, gleaned purely from reviewing the advertising literature that Tiffany also seeks to introduce as exhibits, is "to show the widespread favorable recognition possessed by Tiffany's marks and, accordingly, how such positive attributes of the mark are damaged by defendant's acts." Tiffany Opp. at 1. The initial fallacy in Tiffany's proposition is that the strength of and goodwill associated with Tiffany's trademarks never has been at issue in this litigation. Indeed, eBay does not contest the plain fact that Tiffany's brand is well-known and well-established. Tiffany thus cannot satisfy the threshold requirement of relevance under Rule 401 of the Federal Rules of Evidence; the testimony of Ms. Naggiar and the related exhibits contain no fact "of consequence to the determination of the action." Fed. R. Evid. 401.

Beyond such lack of relevance, the hearsay rules prohibit introduction of evidence of this nature. There can be no other conclusion than that Tiffany is seeking to introduce this evidence "to prove the truth of the matter asserted," Fed. R. Evid. 801(c), that is, that the Tiffany brand is a unique and valuable asset. Vast portions of Ms. Naggiar's testimony are impermissible block quotes that discuss the strength and fame of the Tiffany brand – hearsay in its most classic form. See Declaration of Caroline Naggiar, dated November 5, 2007 ("Naggiar Decl.") at ¶¶ 5-6 (reciting passage to demonstrate that "Tiffany has connected with its customers and the public in a unique way" and "provides a special, personal experience for its customers"); Naggiar Decl. at ¶¶ 7-8 (citing to book that identifies Tiffany as quintessential example of an "emotional brand" that "elevates purchases based on need to the realm of desire").

Tiffany attempts to skirt the prohibition on hearsay by devising a novel "trademark" exception to the hearsay rules, but the cases relied upon state nothing of the sort. Rather, the cases stand for the uncontroversial proposition that, for example, the existence of widespread media coverage can demonstrate the strength of a brand. See, e.g., Tri-Star Pictures, Inc. v. Unger, 14 F. Supp. 2d 339, 350 (S.D.N.Y. 1998) (Edelstein, J.) (finding that critical and public acclaim and receipt of numerous awards provided evidence of mark having attained secondary meaning) (citation omitted); Schieffelin & Co. v. Jack Co. of Boca, Inc., 850 F. Supp. 232, 243 (S.D.N.Y. 1994) (Newman, J.) (noting that DOM PÉRIGNON's inclusion in James Bond films is testament to trademark's strength). That courts have made such observations does not lead to the conclusion, as Tiffany suggests, that plaintiffs may present those courts with the substance of any such coverage and argue that the substance proves the strength of a brand.

Tiffany's inability to overcome the hearsay rules is revealed by the fact that it does not press the central argument it raised during the pretrial conference with the Court on November 9 – that the materials from which Ms. Naggiar quotes are "learned treatises." The rationale for the hearsay exception for learned treatises, governed by Rule 803(18) of the Federal Rules of Evidence, is that "the factfinder should have the benefit of expert learning on a subject, even though it is hearsay." Constantino v. Herzog, 203 F.3d 164, 170-71 (2d Cir. 2000). This hearsay exception does not apply here. First, Ms. Naggiar is not an expert, the only type of witness to which the exception applies. See Fed. R. Evid. 803(18). Second, none of the materials quoted by Ms. Naggiar are authoritative. See Schneider v. Revici, 817 F.2d 987, 991 (2d Cir. 1987) ("to qualify under the learned treatise exception, a proper foundation as to the authoritativeness of the text must be laid by an expert witness") (citation omitted); Tart v. McGann, 697 F.2d 75, 78 (2d Cir. 1982) (finding that Federal Rules of Evidence permit the admission of learned treatises as substantive evidence only when an expert is on the stand and available to explain and assist in the application of the treatise). Finally, even if the above obstacles were overcome, the evidence may not be admitted in the form of an exhibit. See Fed. R. Evid. 803(18) ("If admitted, the statements . . . may not be received as exhibits.").

CONCLUSION

For the foregoing reasons, eBay's objections should be sustained and Tiffany should be precluded from introducing Plaintiffs' Exhibits 425-428, and the portions of Caroline Naggiar's declaration quoting therefrom, into evidence.

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